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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 298

FREDERICA CLAUSEN, DOING BUSINESS AS LUZERNE HIDE AND TALLOW COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (P.A. 203-209)[1] is reported at 188 F. 2d 439. The findings of fact, conclusions of law, and order (B.A. 209a-221a, 157a-203a) of the National Labor Relations Board are reported at 89 NLRB 989.

[1] "P.A." refers to the petitioner's appendix in the court below; "B.A." refers to the Board's appendix in the court below; where, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings and those succeeding it are to the supporting evidence.

JURISDICTION

The decision of the court below was entered on April 2, 1951 (P.A. 203), and its decree was entered on May 14, 1951 (P.A. 210). A petition for rehearing filed by petitioner on May 28, 1951 (P.A. 214) was denied on June 8, 1951 (P.A. 220). The petition for a writ of certiorari was filed on September 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The only questions presented are:

1. Whether Section 9 (f), (g), and (h) of the Act, the limitations of which are restricted to labor organizations, bars the issuance of a complaint based upon individual charges filed by individual employees to secure redress of the discrimination practiced against each of them personally.

2. Whether, as the court below held, substantial evidence on the record considered as a whole supports the Board's finding that each of the strikers denied reemployment had made an unconditional request for reinstatement.[2]

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[2] Petitioner's question numbered 1,—whether it is an unprotected activity for employees to participate in a strike to secure the recognition of a non-complying union—is not presented. See pp. 14-17, *infra*. That question was not put in issue before the Board or in the court below; furthermore, the Board's adequate and unchallenged findings (see pp. 3-12, *infra*) that petitioner's discrimination against the employees stemmed from petitioner's hostility to unionization as such,

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Relations Act 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 26-30.

STATEMENT

The unfair labor practices found pertain to petitioner's refusal to reinstate six named employees, following their unconditional request to return to work upon their abandonment of a strike, because of their antecedent union activity; petitioner's later further refusal to hire these same employees because of their participation in the strike and their union fidelity; and petitioner's discharge of a seventh employee because of his supposed sympathy with the union adherents.

Union activity among the Company's employees, which began March 1, 1948, crystallized with the distribution of union cards among the employees on March 17 by employee Norman Otter and culminated in the formation of Local Industrial Union 1644, directly affiliated with the Congress of Industrial Organizations (B. A. 165a; 74a, 131a). The Company's hostile response to this activity manifested itself immediately. On March 18, after learning that he had distributed membership cards among the employees, the Company discharged employee Otter (B. A. 165a, 166a; 74a, 151a-152a).

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and not from the fact that they participated in a strike to secure the recognition of a non-complying union, suffice to support the Board's order in full.

On March 19, three employees, all union members, were questioned concerning their union sympathies, and the next day these three, as well as a fourth employee, were discharged (B. A. 165a-166a; 108a, 126a, 127a, 143a-144a, G. C. Ex. 2). On March 21, a plant manager invaded a union meeting where he employed abusive language against CIO Field Representative Frank Vrataric, who conducted the meeting, told the employees they were "all fired," and refused to leave the meeting until police arrived (B. A. 166a; 93a-94a, 95a, 125a, 152a). On April 3, two employees were questioned concerning their union activity, one of whom was threatened with discharge after it was learned he signed a union card (B. A. 166a, 187a; 109a, 110a). On May 4, an employee, later discharged on May 10, was interrogated concerning his union activity (B. A. 166a; 88a, 143a); immediately prior to this discharge, the employees were assembled and told that the Company had been quite "lenient" with them up to that time but that it was "going to get tough" if the employees "wanted to have a union" (B. A. 166a; 125a, 89a).[3]

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[3] The Pennsylvania State Labor Relations Board, after proceedings before it, found that the foregoing conduct constituted unfair labor practices within the meaning of the State Act, and also conducted an election among the employees, following which it certified the Union as the exclusive bargaining representative (B. A. 166a; 55a-59a). However, on October 5, 1948, the State Board vacated its orders on the ground that it had no jurisdiction because the Company was engaged in interstate commerce (B. A. 167a; 43a, 56a-59a).

In this context of anti-union animus, on June 30, 1948, based on a strike vote taken the previous day (B. A. 168a), seventeen of the Company's thirty employees struck, the purpose of the strike being to obtain recognition of the Union and improved working conditions (B. A. 169a; 81a, 96a-97a, 106a, 131a). On the following day the Company met with a committee of the strikers designated to negotiate an agreement, as well as with CIO Representative Vrataric and other strikers, in attempts to settle the strike, but no agreement was reached (B. A. 169a-172a; 106a-107a, 132a, 55a, 47a 85a-86a, 100a, 102a, 109a, 121a, 134a). The Company predicated its refusal to recognize the Union on the ground that the issue of recognition was then pending before the Pennsylvania Labor Relations Board (B. A. 169a, 170a).[4]

About two days after the strike began, a small "clique" of five employees, all of whom, prior to

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Thereafter, on November 17, 1948, a charge was filed with the National Board alleging the commission of the same unfair labor practices theretofore litigated before the State Board (P. A. 1a-4a), but this charge, filed more than six months after the commission of the unfair labor practices, was dismissed by the Regional Director of the Fourth Region of the National Board as untimely (P. A. 5a-6a), inasmuch as Section 10 (b) of the Act requires that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . ." Nevertheless, as the Board and the court below held (B. A. 176a-180a, 212a, P. A. 207),—a holding which petitioner does not now challenge—although this conduct may no longer be redressed, it is relevant evidence by which to evaluate the subsequent acts of discrimination engaged in by the Company which are the subject of this proceeding.

[4] See note 3, supra.

the strike, either openly expressed opposition to the Union or were indifferent to its activities (B. A. 185a, 187a; 62a, 63a, 70a, 71a-72a, 79a, 120a, 69a, 116a, 92a, 46a, 115a, Tr. 404), formed among the strikers (B. A. 173a; 63a, 72a). The strike apparently had come as a surprise to them and they joined in it only because "the rest of the men stayed out" (B. A. 185a; 68a, 71a, 72a, 117a). While the strike was in progress, they expressed dissatisfaction with the Union, claiming that they were excluded from union policy discussions and had been "misled" into believing that the Union had been chartered by the CIO, when such was not the case (B. A. 173a, 185a; 63a, 71a, 72a 117a).

On the morning of July 6, members of this anti-union "clique" openly declared themselves to be in favor of abandoning the strike and returning to work. (B. A. 173a-174a; 83a-84a, 103a). After learning of the intentions of the men, CIO Representative Vrataric came to the plant area and spoke to all the strikers (B. A. 174a; 103a). He urged the men not to return to work unless the Company signed a proposed agreement submitted to it by Vrataric earlier in the day (B. A. 174a; 99a, 103a, 156a). Nevertheless, after Vrataric left the scene, and following some further discussion, the men voted to abandon the strike and apply for their jobs (B. A. 174a; 84a, 113a-114a).

On the afternoon of July 6, the same day, Michael Korpalski, a member of the anti-union "clique",

entered the plant and asked Manager Robert Clausen if he still had a job and, in the alternative, if he did not, for permission to obtain his working clothes (B. A. 174a; 66a). Immediately thereafter the remainder of the strikers joined Korpalski and gathered around Clausen (B. A. 174a; 66a, 130a). A number of them stated in unison, "We want our jobs back" (B. A. 174a; 146a, 24a, 121a). The Board found (B. A. 174a), with the affirmance of the court below (P.A. 205), that "this constituted an unconditional application for reinstatement by those who had entered the plant," which carried out the "unconditionally voted" decision of the strikers on the morning of the same day "to abandon the strike and apply for their jobs."

At the time of this unconditional request for reinstatement, three of the seventeen strikers had already abandoned the strike and returned to their jobs (B. A. 173a; 21a), and two strikers never applied for reinstatement (B. A. 174a; 130a), which left a group of twelve strikers to whom the request for reinstatement applied. To the request for reinstatement made by these twelve strikers, Manager Clausen replied that the Company did not require the services of all of them because he had already hired some new employees, but that he could use some of the applicants whose names he did not disclose (B. A. 175a; 146a-147a). At this point, Mrs. Clausen, the owner, arrived and stated that the men were all discharged or that

there was no work for any of them (B. A. 175a; 67a, 147a, 109a, 121a). Immediately thereafter Mrs. Clausen left the plant and the majority of the men started to leave. Some, however, proceeded to get their working clothes. (B. A. 175a; 147a.)

Nevertheless, although having ostensibly denied reinstatement to all the strikers, the Company later on the same day rehired the entire group of five strikers who comprised the anti-union "clique" (B.A. 175a-176a; 67a, 68a, 92a, 116a, 127a, 135a). The only striker rehired on July 6 who was not a member of this anti-union group, Beathier Schloyer, was discriminatorily discharged on July 8 (*infra,* pp. 11-12). The remaining six strikers—Harry Kishbaugh, Sterling Kishbaugh, Sr., Lee Schell, Lester Roth, Henry Ertwine, and Howard Yoder—who were not reinstated on July 6 comprised, as the Board found (B. A. 185a), "the elected officials of the Union, those who attended union meetings, [and] the signers of union cards . . ."

Harry Kishbaugh was first employed by the Company in 1929 and thereafter worked for it intermittently for 3 or 4 years (B. A. 187a; 105a). Reemployed in 1933, he worked continuously in various capacities, including laborer and driver (*ibid.*). Prior to the strike he was employed as a driver (*ibid.*). Kishbaugh, as the Company knew, was the president of the Union and a mem-

ber of the committee that sought to negotiate a contract with the Company (B. A. 186a-187a; 118a, 132a). He attended all union meetings, including the March 21, 1948, meeting which Manager Robert Clausen invaded and at which Clausen threatened everyone present with discharge (B. A. 187a; 105a, *supra,* p. 4).

Sterling Kishbaugh, Sr., brother of Harry Kishbaugh, worked for the Company as a fireman-laborer since 1940 (B. A. 187a; 104a, G. C. Ex. 2). He attended union meetings and was elected Union Committeeman (B. A. 186a; 111a). Kishbaugh actively picketed during the strike and personally requested employees to observe the picket line (B. A. 114a-115a). He, too, attended the March 21 union meeting to which Robert Clausen came uninvited, and was known to Clausen as an official of the Union (B. A. 187a; 118a, 132a).

Lee Schell, a driver, worked continuously for the Company since 1942 (G. C. Ex. 2). He was vice-president of the Union and attended union meetings (B. A. 187a; 82a-83a). He was also one of the committeemen that sought to negotiate an agreement with the Company during the strike (B. A. 186a; 119a, 132a).

Lester Roth, son-in-law of Sterling Kishbaugh, Sr., was employed by the Company as a laborer in June 1947 (B. A. 187a; 104a, G. C. Ex. 2). He was a member of the Union and attended its meetings, including the one which Robert Clausen in-

vaded on March 21 (B. A. 187a; 118a). He openly discussed union activities with the employees, and picketed for the Union during the strike (B. A. 187a; 120a, 121a, 122a).

Henry Ertwine was hired as a driver in February 1948 (G. C. Ex. 2). Ertwine attended union meetings and, as the Company knew, was elected Committeeman at one of these meetings (B. A. 186a; 187a; 106a, 113a, 118a). On April 3, 1948, Mrs. Clausen, the owner, had interrogated him concerning his union activities (B. A. 166a; 110a).

Howard Yoder, a driver, had been in the company's employ since 1946 (G. C. Ex. 2). He was one of the first employees who signed a union card and attended union meetings (B. A. 187a; 74a, 109a). At the hearing before the Board, Robert Clausen specifically named him as one of the employees whom he interrogated concerning union matters (B. A. 186a; 150a). And on April 3, 1948, Mrs. Clausen also asked him whether he had signed a union card. When Yoder replied that he had, Mrs. Clausen told him that "you are as good as going out on the road" (B. A. 166a; 187a; 109a).

As to these six strikers, the Board found that the Company "applied a discriminatory basis for the selection of employees among its strikers to fill the remaining vacancies on its staff" (B. A. 188a). The discriminatory standard of selection was inferred from the Company's "marked failure to reinstate anyone known to be active in union

leadership and activities," and its reinstatement "only" of "men whom it knew or had reason to believe were opposed to the Union or merely quiescent in going along with the union leadership" (B. A. 188a-189a).

In addition to the discrimination practiced against these six strikers on July 6, when the Company hired other workers in ensuing months in job classifications filled by them (B. A. 176a; 49a, 140a, G. C. Ex. 2, 52a), it did not recall these same employees because they were deemed not "suitable" for reemployment since they might engage in another strike (B. A. 190a; 50a, 137a). As conceded by its manager, the Company removed from its office files the original employment applications of the strikers because they had, by striking, refused "to go to work by their own admission of union activity" (B. A. 191a; 137a-138a). The Board found this refusal to rehire the six employees because of their participation in the strike and union adherence to be an independent act of discrimination against them (B. A. 191a).

As stated, *supra*, p. 8, Beathier Schloyer was the only striker rehired on July 6, who was not a member of the anti-union group which led the movement to abandon the strike. Schloyer was assigned the night shift on July 6, and later that evening, Mrs. Clausen, the owner, asked him if he had joined the Union and paid it any money (B. A. 192a; 128a). When Schloyer admitted that he had

done both, Mrs. Clausen warned him "to watch" out "because [CIO Representative] Vrataric and the boys are out on the road looking for you" (*ibid.*). Schloyer absented himself from work the next day, July 7 (B. A. 192a; 128a). When he reported to work on July 8, Manager William Clausen asked him: "Did the boys try to keep you from coming to work last night?" (B. A. 192a; 54a, 135a, 129a). Schloyer replied, "in a way, yes," but quickly added that "it didn't work" (*ibid.*). Thereupon Clausen discharged him, stating that Schloyer had no cause to fear any outside interference from the Union and that he, Schloyer, was "as bad as the rest of them" (B. A. 192a; 129a, 135a). The Board found that Schloyer's discharge because of his supposed sympathy with the union adherents was discriminatory (B. A. 193a).

To obtain redress of the discrimination practiced against each of them, the seven employees executed and filed separate charges with the National Labor Relations Board on December 29, 1948 (B. A. 177a; 7a-27a, G. C. Ex. 1-B). The Union had not complied with the filing requirements of Section 9 (f), (g) and (h) of the Act (B. A. 162a; 41a). Prior to the hearing before the Board, and again in the course of the hearing, the Company moved to dismiss the complaint, issued on the basis of these individual charges, on the ground that some, but not all, of the charges were filed by employees who were officials of a

non-complying union (B. A. 162a; 28a-29a, 35a-36a, 40a-42a). The trial examiner denied the motion (B. A. 162a-164a), and his ruling was affirmed by the Board (B. A. 211a-212a), holding that "although some of the individuals filing the charges in the instant proceeding were officials of the union, nevertheless, they were not fronting for a labor organization in procuring the benefits of the processes of the Board for that labor organization but were rather filing charges which sought to obtain redress for individual employees for conduct directed against said employees" (B. A. 164a).

Accordingly, the Board entered a customary remedial order requiring petitioner to cease and desist from further unfair labor practices and to reinstate and make whole the employees it had discriminated against (B. A. 215a-218a).

The court below decreed enforcement of the Board's order, affirming in full its findings of fact and conclusions of law (P. A. 203-214). The court found that substantial evidence on the whole record supported the Board's conclusion that, having made an unconditional request for reinstatement (P. A. 205), the six strikers were discriminatorily denied employment on July 6, 1948, the "reemployment situation" showing "clearly that the employees favoring the union were consciously discarded for those who did not" (P. A. 206); that, as an independent violation, there was continued discrimination thereafter against these employees because of

their participation in the strike and union adherence (P. A. 206-207); and that the discharge of employee Schloyer on July 8, 1948, was discriminatorily motivated by the "belief that he had been influenced by the union" (P. A. 207). The court also held that the complaint was properly issued on the basis of the charges filed by these employees because the "restrictions of the section [9 (f), (g) and (h)] are not imposed on the individual employees" (P. A. 208-209).

ARGUMENT

1. As we show below, pp. 17-21, *infra,* the question whether a strike for recognition is unprotected when conducted by a non-complying union does not warrant review by this Court. But, in any event, that question is not properly before the Court in this case because (a) it was not put in issue before the Board or in the court below; and (b) the validity of the decision in this case does not turn upon its resolution.

a. Not until it filed a belated petition for rehearing in the court below did petitioner challenge the protected character of the strike on the ground that it was conducted by a non-complying union. After the commencement of the strike, petitioner's sole stated reason for refusing to recognize the Union was the pendency of the representation question before the Pennsylvania State Labor Relations Board (*supra,* p. 5), so that the Union's noncompliance was not contemporaneously as-

serted as the reason for declining to treat with it. Before the National Board, respondent contended that the strike was illegal because it allegedly violated Section 8 (b) (4) (B) of the Act (B. A. 29a, 37a), but that section forbids only a secondary, not, as in this case, a primary strike for recognition. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 28 LRRM 2195, 2201 (C. A. D. C., June 21, 1951). Petitioner raised the present objection for the first time by a petition for rehearing filed in the court below fifty-eight days after it rendered its decision (P. A. 214); the Board filed no response to this petition and the court summarily denied it ten days later (P. A. 220).

Even if this injection of the issue for the first time on rehearing were timely, the court below properly refused to consider it, for Section 10 (e) of the Act requires that "No objection that has not been urged before the Board . . . shall be considered by the court" in the absence of extraordinary circumstances. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. Accordingly, petitioner requests this Court to consider a question which the Board had no initial opportunity to determine and which was not reviewed by the court below in its revisory capacity. Certiorari will not be granted to review a question "not properly raised, litigated or passed

upon below." *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328.

b. The Board's findings of fact, affirmed by the court below, make clear that, in addition to participating in the strike for recognition, the employees engaged in other union activity, such as distributing and signing union membership cards, attending union meetings, and other conduct designed to obtain economic betterment through union organization. The findings also show, pp. 3-12, *supra*, that it was petitioner's antipathy to unionization and collective action of any kind, and not the mere fact that the employees participated in a strike to secure the recognition of a non-complying union, which led petitioner to discriminate against the employees.

Petitioner does not contend that any organizational activity undertaken by employees in association with a non-complying union is outside the protection of the Act; petitioner limits her challenge to a strike for the recognition of a non-complying union. Accordingly, since the employees engaged in union activity other than participation in the strike for recognition, and since petitioner's denial of employment was motivated by hostility to union activity generally, there exist adequate and unchallenged findings of discrimination, independent of the strike for recognition, which suffice to support the Board's order in full. Thus, determination of the question which petitioner presents

would not affect the order; the question is therefore "of a hypothetical or abstract character" (*Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240), inappropriate for review in this proceeding.

c. In any event, the question petitioner poses is insubstantial. Petitioner contends that since a non-complying union may not utilize the facilities of the Board to secure enforcement of the employer's bargaining obligation, it follows that the Act exposes to reprisal those employees who participate in a strike to induce the employer to recognize a non-complying union. Even if the employer's obligation to bargain were suspended during the period of a union's non-compliance,—which it is not (*West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. 2d 233, 239 (C.A. D.C.), certiorari denied, 341 U. S. 939; *New Jersey Carpet Mills, Inc.,* 92 NLRB, No. 122, 27 LRRM 1114, 1116-1119)—it would not follow that employees would forfeit the protection of the Act by striking to induce recognition of a non-complying union. The obligation laid upon employers to refrain from discriminating against employees for striking is not limited to those strikes which compel an employer to perform his statutory obligations. Recognition of a non-complying union by the employer is nowhere made illegal; a strike to accomplish that end cannot be said to have an unlawful objective. Thus, petitioner would transform what is a procedural limitation upon a non-complying

union's access to the Board's processes into a substantive alteration of the obligations exacted of employers in their relationship to employees. Petitioner thereby would substitute for the specific method adopted by Congress to achieve the objectives of Section 9 (f), (g) and (h) of the Act another method which Congress could have selected, but did not. "The Act's only sanction for non-compliance is denial of Board facilities. * * * It is thus the Board which refuses its processes to the non-complying union, not the employer." *West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. 2d 233, 239 (C.A. D.C.), certiorari denied, 341 U. S. 939; see also *New Jersey Carpet Mills, Inc.,* 92 NLRB, No. 122, 27 LRRM 1114, 1116-1119.

Section 9 (f), (g), and (h) requires that, if a labor organization and its affiliates fail to file operational and financial statements with the Secretary of Labor and furnish financial statements to their members, and if their officers fail to file non-Communist affidavits, the Board may not (1) investigate a question concerning representation raised by the labor organization, (2) entertain a petition for a union shop election on behalf of the labor organization, or (3) issue a complaint pursuant to a charge filed by the labor organization. As a result of debarment from access to the Board certain important detriments inure to non-complying unions. By closing the Board's processes to non-complying unions, while leaving them open

to unions in compliance, non-complying unions incur serious competitive disadvantages in securing the favor of employees. Even without inter-union rivalry the detriment is manifest, for the non-complying union is divested of recourse to the Board either to secure the redress of unfair labor practices or the establishment of its status as exclusive representative. Furthermore, since an order to bargain with a union is tantamount to certification of that union, both fixing a future bargaining relationship, the Board will not order an employer to bargain with a non-complying union in circumstances where it would not have certified it as representative. *American Communications Association* v. *Douds,* 339 U. S. 382, 386; *Marshall and Bruce Co.,* 75 NLRB 90, 95-96; *New Jersey Carpet Mills, Inc.,* 92 NLRB No. 122, 27 L.R.R.M. 1114, 1118. In addition, as a consequence of its inability to obtain authorization, a non-complying union "may not enter into a union shop contract with an employer," and as a consequence of its inability to be certified as representative, if "another union is certified, the noncomplying union incurs the disabilities of §§ 8 (b) (4) (C) and 303 (a) (3) . . . Similarly, certain strikes and boycotts are prohibited to noncomplying unions by §§ 8 (b) (4) (B), 8 (b) (4) (C), 8 (b) (4) (D) of the Act." *American Communications Association* v. *Douds,* 339 U.S. 382, 390 and n. 6.

These are the effective disadvantages invariably

resulting from noncompliance which Congress deemed sufficient to secure the financial and operational responsibility of unions and their freedom from Communist or other subversive influence. In seeking to go farther and place additional restrictions not on the noncomplying unions but on their members as individual employees, petitioner not only departs from the explicitly formulated statutory scheme of Section 9 (f), (g), and (h), but also cuts into the protection from reprisal which Congress continued to guarantee to employees. As before the amendments, Section 7 of the Act guarantees rights of self-organization to "employees" and Section 8 (a) protects their exercise from employer infringement. Thus, as before the amendments, "the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions . . ." *National Labor Relations Board* v. *Schwartz,* 146 F. 2d 773, 774 (C.A. 5); see also, *National Labor Relations Board* v. *Augusta Chemical Co.,* 187 F. 2d 63 (C.A. 5); *Joanna Cotton Mills Co.* v. *National Labor Relations Board,* 176 F. 2d 749, 752-753 (C.A. 4), and cases cited. The retention intact of the safeguarded rights of employees in Section 7 and 8 (a) of the Act, together with the procedural character of the limitations imposed by Section 9 (f), (g), and (h) on labor organizations, show plainly that Congress intended to keep the duty which employers owe to employees separate

from the capacity of labor organizations to have recourse to the Board.[5] By this means Congress achieved the objectives of Section 9 (f), (g), and (h) without sacrificing the right of employees to be free from the hazards of employer retribution. Petitioner would obliterate the line carefully preserved by Congress.

Petitioner's attempt to divest employees of protection when they participate in a strike for the recognition of a non-complying union also conflicts with Section 13 of the Act. "By § 13, Congress has made it clear that . . . all . . . parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act." *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 673. Section 9 (f) (g), and (h) cannot be read as specifically providing for diminution of the right to strike for recognition. "Present law in no way limits the primary strike for recognition except in the face of another union's certification." Report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, Part 3, 80th Cong., 2nd Sess., 70-71.

2. Each of the seven employees discriminated

[5] The Board has consistently held to the view that the limitations of "Section 9 (f), (g), and (h) relate to union rights only, thus leaving unaffected the rights created in Section 7 for individual employees." *Andrews Co.*, 87 NLRB 379, 383.

against filed separate charges with the Board complaining of their individual termination of employment (*supra,* p. 12). Two were officers of the Union (*supra,* pp. 8-9); two others were members of the committee seeking to negotiate an agreement with the employer (*supra,* pp. 9, 10); and the remaining three were union adherents (*supra,* pp. 9-10, 11-12). Petitioner contends with respect to the two officers, and perhaps with respect to the two committeemen, that to issue a complaint based on their charges countenances circumvention by the Union of the filing requirements of Section 9 (f), (g), and (h).

Petitioner's contention is completely undermined by the finding of the Board (*supra,* p. 13), affirmed by the court below (*supra,* p. 14), that the individual charges were filed by the employees, not for the purpose of obtaining a surreptitious benefit for the Union, but in order to remedy their own personal victimization. Since a charge may be filed by any person (*National Labor Relations Board* v. *Indiana & Michigan Electric Company,* 318 U. S. 9, 17-18), and since the limitations of Section 9 (f), (g), and (h) are specifically confined to labor organizations, Congress obviously contemplated continued access to the processes of the Board by individual employees without regard to the compliance status of their unions. It is to be expected that such employees may well be assisted by their unions in bringing charges before

the Board and that the unions may be incidentally benefited through redress of the wrongs done the employees. But in leaving open an avenue of recourse to the Board by individual employees, Congress undoubtedly anticipated these factors and regarded them as ancillary to its dominant purpose of preserving a means of safeguarding employees from reprisal. To disqualify employees from invoking the aid of the Board because of their association with a non-complying union is tantamount to closing the door which Congress left open. Accordingly, where, as here, individual charges are filed by employees to secure redress for the discrimination directed against them, a complaint may properly issue, as the court below held (R. A. 207-208), in conformity with the decision of the Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *Augusta Chemical Co.*, 187 F. 2d 63, enforcing 83 NLRB 53, 54, n. 2, 60-61.[6] No conflict of decisions exists and none is claimed.

3. It is the settled rule that economic strikers who desire to return to work are required to make

[6] See also, *W. T. Rawleigh Co.* v. *National Labor Relations Board*, 28 L.R.R.M. 2324, 2327 (C.A. 7, July 9, 1951), where, in a proceeding based on individually filed charges, the union not being in compliance, it was held that it "cannot be inferred that the Union itself became a party to the proceeding or was entitled to any measure of relief therein because the individual complainants were members of the Union; because the Union, or its attorney, advised, counseled, and assisted in the preparation and filing of the charges or in the prosecution thereof, or because a Union official broadcast the statement that 'the International Longshoremen's and Warehousemen's Union, C. I. O. intends to fight the cause of these employees all the way.'"

an unconditional request for reinstatement before the denial of employment to them can be held to be discriminatory. Applying this rule, the Board found (*supra,* p. 7), and the court below affirmed its conclusion (*supra,* p. 7), that the six strikers denied reemployment on July 6, 1948, had made an unconditional request for reinstatement. Respondent's challenge to this finding and the court's affirmance of it raises merely a question of the substantiality of the evidence on the record considered as a whole to sustain the finding. The finding is amply supported (*supra,* pp. 6-7), and an issue of fact in any event plainly warrants no review. The claimed conflict between the decision below and *National Labor Relations Board* v. *Crosby Chemicals, Inc.,* 188 F. 2d 91 (C.A. 5), does not exist, for both courts applied the same substantive rule and, with respect to different fact situations, merely arrived at different conclusions as to the substantiality of the supporting evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 9. * * *

* * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing —

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the finan-

cial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the

officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

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